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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 89

ROY WALKER, PETITIONER,

vs.

SOUTHERN RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1966
CERTIORARI GRANTED MAY 2, 1966

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 14, 1966.

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9967

ROY WALKER, Appellee,

vs.

SOUTHERN RAILWAY COMPANY, Appellant.

No. 9968

ROY WALKER, Appellant,

vs.

SOUTHERN RAILWAY COMPANY, Appellee.

Appendix to Brief for Appellant

[fol. 1] ROY WALKER, sworn:

Cross examination.

By Mr. Ward:

Q. What date did you go to work for the Railroad, Mr. Walker?

A. 1944.

• • • • • • •

ROY WALKER, sworn:

Direct examination.

By Mr. Hamrick:

Q. What did you see, if anything, when you walked into the call box at the Southern Railroad Office on May 29, 1957?

A. I saw a message on the Crew Clerk's Desk posted on where the crew book lies, you know, that said I had forfeited my seniority at midnight on May 28th.

• • • • • • •

Q. Now, I will direct your attention to the testimony of your daughter on March 7, 1957, state whether or not she made a telephone call for you?

A. Yes, sir.

Q. Where did she call, relative to the number?

A. She called Air Line Junction at Charlotte, North Carolina.

Q. What is at Air Line Junction, if you know?

A. You mean the telephone number?

Q. Yes, sir.

A. I don't remember.

Q. Air Line Junction, state whether or not that is a place of operations of the Southern Railway?

A. Yes, sir.

Q. Where does the Crew Clerk and the Call Clerk stay?
A. Right there in the yard office.
Q. And where is the yard office?
A. It's at Air Line Junction.
[fol. 2] Q. Did you hear what your daughter said to the person who answered the phone?
A. Yes, sir.
Q. What did she say?
A. She told them to mark me off sick, that I was not able to work.
Q. Later on Mr. Walker, did you have surgery?
A. Yes, sir.

* * * * * * *

Q. Mr. Walker, about May 11th, state whether or not you went to see Dr. T. R. Harris?
A. Yes, sir.
Q. State whether or not Dr. Harris wrote any letter at your request?
A. Yes, sir.
Q. To whom was that letter directed?
A. Edward R. Brinkley, Terminal Train Master, Air Line Junction, Charlotte, North Carolina.
Q. Did Dr. Harris give you the letter after he wrote it?
A. Yes, sir, he addressed it and I took it to the Post Office and mailed it.
Q. Why did you request him to write the letter?
A. Because I had been given a letter to protect my seniority within thirty (30) days or I would have forfeited it.
Q. Did you see the letter that Dr. Harris wrote?
A. Yes, sir.
Q. Did you read it?
A. Yes, sir.
Q. What did it say relative to your ability to work?
A. It said that I was unable to work.

* * * * * * *

[fol. 3] By Mr. Hamrick:

Q. Mr. Walker on April 9, 1957, state whether or not you saw E. R. Brinkley?

A. Yes, sir.

Q. Do you remember the exact date? Or is it some day thereabouts?

A. It was sometime about April 9th.

The Court: Of '57?

A. Yes, sir, that's right.

Q. Mr. Walker, do you know what Mr. Brinkley's position was with the Southern Railway at that time?

A. Terminal Train Master.

Q. Now, will you relate the conversation you had with Mr. Brinkley?

A. Well, when we went to the Trade Street Railroad Station on Trade Street in Charlotte, when I started in the station, Mr. Brinkley came out I spoke to him.

Q. What did you tell him?

A. He asked me where I had been and I told him I had been sick.

Q. What did he say.

A. Ah, Chief, you haven't been sick.

Q. What did you say?

A. I said, yes, sir, I have.

Q. What did you tell him had been the matter?

A. I told him I had had an operation.

Q. Now, then, what did you tell him about coming back to work if anything?

A. I did not tell him anything about coming back to work.

Q. What did he say to you about coming back to work?

A. He said, when I got able to come back to work to let him know.

[fol. 4]

DEFENDANT'S EXHIBIT NUMBER ONE

Letter from J. R. Brosnam to Roy Walker
dated April 29, 1957.

"Greenville, South Carolina
April 29, 1957
PR-1151

Mr. Roy Edmunt Walker,
Route 1,
Box 102
Forest City, N. C.

Dear Sir:

I understand you were displaced from a regular job at Air Line Junction, March 3, 1957 and have idled yourself since.

This is to advise you that you stand for work on your seniority and unless you protect your seniority standing within 30 days from the date of this letter, you will have forfeited your seniority.

Yours very truly,

Superintendent

Mr. Brinkley:

Please let me know if and when Fireman Walker reports.

J. R. B.

Copy:

Mr. E. C. Bradley, Local Chairman,
Brotherhood of Railroad Firemen,
306 West Earle Street,
Greenville, S. C."

[fol. 5] J. R. BROSNAM, sworn:

Direct examination.

By Mr. Ward:

Q. If you registered this letter or had a return receipt from him?

A. Yes, sir, this registered letter was registered under certificate 804699 and we received this receipt back at Greenville, and on the number one on the back side of this signed R. E. Walker and on line two it's signed Mrs. C. H. Walker.

Mr. Hamrick: I take it you are going to offer that?

A. The date is April 30, 1957.

Q. The date of the letter?

A. The date she signed her name to the receipt.

Q. The same date of the letter?

A. April 30, 1957.

DEFENDANT'S EXHIBIT No. Two

The Return Receipt

"Side one:

Post Office Department	Penalty for Private Use to avoid Payment of Postage $300 (GPO)
*RECEIVED NO. ————	Post Mark of *
CERTIFIED NO. 804699-PR-1151	Delivering Office
INSURED NO. ————	
	Name of Sender: Southern Railway Co.
RETURN TO	Street and No. or P. O. Box Superintendent's Office
	Post Office Greenville
POD Form 3811 Apr. 1955	State S. C.

[fol. 6] Side Two:

DELIVERING EMPLOYEE	☐ Deliver ONLY to addressee. ☐ Show address where delivered.

Received from the postmaster the registered, certified, or insured article, the number of which appears on the face of this return receipt.

1. R. E. Walker
   (Signature or name of addressee)
2. Mrs. C. W. Walker
   (Signature of addressee's agent—
   Agent should enter addressee's
   name on line ONE above)

DATE OF DELIVERY April 30, 1957

U. S. Government Printing Office: 1955 16-71548-1"

W. E. CURLEE, sworn:

Direct examination.

By Mr. Edwards:

Q. What time did you take over at the Charlotte Yard? What time of the month and date?

A. May 16th.

Q. Of what year?

A. 1957.

Q. What was your position?

A. Terminal Train Master.

Q. Of the Charlotte Yard?

A. Yes, sir.

Q. Was Mr. Roy Walker at the terminal of the yard as fireman at that time?

A. He was carried on the seniority list.

Q. He was on the seniority list at that time?

A. Yes, sir.

Q. When you were terminal train master at the Charlotte yard? Did Mr. Roy Walker come to see you in response to a letter he had received from Mr. J. R. Brosnam [fol. 7] with reference to the protection of his seniority, and if so, when?

A. On May 29th, approximately 2:00 or 2:30 p. m. of that evening.

Q. On May 29th at when?

A. Approximately 2:00 or 2:30.

Q. Who was with him?

A. The best I recall his daughter.

Q. Did you have a conversation with Mr. Walker on that day at that time?

A. Yes, sir.

Q. Will you give the Court the substance of that conversation as near as you remember it?

A. Mr. Roy Walker arrived at approximately 2:00 or 2:30 on May 29th and asked for Mr. Edward Brinkley, train master, I informed Mr. Walker that Mr. Brinkley had retired and that I was filling the term of train master position. And he said that he had come to mark up in lieu of the letter which he had received and he noticed a note on the crew book restricting him from marking up as of midnight May 28th.

Q. What did you tell him in response to that?

A. He told me that he had been sick; that he had been in the hospital.

J. R. Brosnam, sworn:

Direct examination.

By Mr. J. Nat Hamrick:

Q. When did the Call Clerk strike Mr. Walker's name from the list on that book?

A. When I notified him.

The Court: Is this what you call a union contract?

Mr. Hamrick: Yes, sir, I would like to particularly call attention to Article 25, subsection (e) 3, Page 38, and it reads as follows:

> "When hired engineers or firemen are laid off on account of reduction of service they will retain all seniority rights provided they return to actual service [fol. 8] within thirty days from the date their services are required."

By Mr. George Ward:

Mr. Ward: I offer this Exhibit No. 2, Defendant's Exhibit No. 2, receipt received into evidence.

A. No, sir, it is not the same date as the letter. The letter is dated April 29, 1957, and the receipt is signed by Mrs. Walker is April 30, 1957.

W. E. CURLEE, sworn:

Cross examination.

By Mr. J. Nat Hamrick:

Q. On the morning of May 29th there was a message saying that under no circumstances was Mr. Walker to be allowed to mark up because he had forfeited his seniority at twelve o'clock on the night of May 28th?
A. That's correct.

J. R. BROSNAM, sworn:

Cross examination.

By Mr. J. Nat Hamrick:

Q. Mr. Brosnam, I direct your attention to Page 27 of the deposition and ask you if in response to my question

which reads as follows: "Mr. Walker did report in for duty the day after you contend his seniority was taken, Didn't he" and I'll ask you if you didn't answer on Page 28, "That is my understanding", and if that is not your answer now?

A. That is correct.

ROY WALKER, sworn:

Direct examination.

By J. Nat Hamrick:

Q. Mr. Walker, what time on May 29, 1957, did you go to Air Line Junction, approximately?

[fol. 9] A. Well, the best of my recollection, it was somewhere around 2:00 in the afternoon.

W. E. CURLEE, sworn:

Cross examination.

By J. Nat Hamrick:

Q. On the morning of May 29th, there was a message saying that under no circumstances was Mr. Walker to be allowed to mark up because he had forfeited his seniority at twelve o'clock on the midnight of May 28th?

A. That is correct.

The Court: Mr. Brosnam, let me ask you this, in Exhibit No. 3 the words "Protect your seniority" appear; also in Exhibit No. 1 the words "unless you protect your seniority", what's meant by those words with respect to this case? I can imagine it may mean a whole lot of things, but with respect to this case would it have protected Mr. Walker's seniority if he had come in during this thirty day period or written and said "I'm sick in the hospital", and so on?

A. That is correct and he could have written me and answered my letter.

The Court: Is it fair to say that if he had gotten notice to you or, well say, Brinkley, wasn't Brinkley his crew chief or something?

A. Brinkley was the Terminal Trainmaster at Air Line Junction, Charlotte.

The Court: If he had written you or Brinkley that he was sick, unable to work, in the hospital, do you say that would have protected his seniority?

A. Your Honor, I'm the only one in the Charlotte Division that would be allowed to write that letter that you see there. Therefore he should have answered that letter back to me or phoned me.

The Court: I realize that, but I notice on Exhibit I you are asking Brinkley to "let me know if and when Fireman Walker reports."

A. That's true. What he could have done right there, he could have marked up for work at Air Line Junction. That was the reason I put that on the bottom.

[fol. 10] The Court: Just suppose—I'm being hypothetical on purpose, suppose he had written you. I know that he didn't, he does not even say that he did, but just suppose that he had written you during the period and said that he was sick and in the hospital, would that have extended the thing another thirty days or sixty days or six months, or what?

A. Well, he wouldn't have forfeited his seniority. I'll say that. Of course, what we would do in there, Your Honor, is the need the man for work, he stood for work, the junior man or the man immediately under him on the seniority roster was working so that showed—

The Court: But that doesn't answer my question. Suppose, in response to Defendant's Exhibit No. 1, Mr. Walker

had written you like you say he should have done and say, "I'm sick, I'm in the hospital, I can't work"?

A. That would have taken care of the situation.

Statement of Mr. Hardy, Counsel for the Defendant:

As I understood Mr. Brosnam's testimony, if a letter had been received from Mr. Walker by the right man saying he was sick and unable to report and would be unable to report for the period allowed him I understood Mr. Brosnam to say this would take care of the situation.

The Court: Do you agree with Mr. Brosnam's interpretation of it as counsel for the railroad.

Mr. Hardy: Yes, sir.

J. R. BROSNAM, sworn:

Direct examination.

By Mr. J. Nat Hamrick:

Q. Now, I continue to direct your attention to Page 28 of your adverse examination and ask you if you didn't make the following responses to the following questions which I asked you and if those aren't your answers now: Question on Line 11, "You have any reason to want to discharge him except he didn't report for seniority?" I'll ask you if your answer to that question was not: "No, sir, we needed him or he would never have given him the thirty day notifica-
[fol. 11] tion to return to duty". That was your answer, then and now?

A. That is right.

Q. All right, sir, on Line 15, question: "You had no other reason for wanting to discharge him at all?" I'll ask you if you didn't answer that, beginning with Line 7: "That's right. I don't know the man personally and I don't have any grudge against him. In other words I was carry-

ing out the provisions of the work agreement when I wrote the letter."

A. That's correct.

JAMES W. PORTER, sworn:

Direct examination.

By J. Nat Hamrick:

Q. What is your name, sir?

A. James W. Porter.

Q. Were you employed by the Southern Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Yard Conductor, Yard master and Switchman.

Q. How many years did you work for the railroad?

A. About 23.

Q. When did you retire?

A. April 16, 1962—I believe it was '62. It's been 2 years this last April.

Q. In your service with the railroad did you have occasion to learn and understand the time as counted in letters the way the time is counted when a man is given 30 days to protect his seniority?

A. Yes, sir.

Q. The custom and usage of the railroad in counting the time you understand?

A. We kicked it around enough, the boys.

Q. In counting that time, state whether or not you count the date of the letter as one day in the thirty days?

A. No, sir.

[fol. 12] Q. You do not?

A. No, sir.

Q. State whether or not you count the date the man received the letter as one of the days of the thirty days?

A. No, sir.

Q. When do you begin counting the thirty days?

A. Thirty days after he receives the letter.

Q. And the first day you count is the day he receives the letter? Or the day after he receives the letter?

A. The day after he receives it. The day he receives it is not a whole day and he has thirty days.

J. R. Brosnam, sworn:

Cross examination.

By J. Nat Hamrick:

Q. Mr. Brosnam, you have your deposition before you, sir?

A. Yes, sir.

Q. Would you please turn to Page 25? I'll ask you if your responses to these questions were not the responses you made and if they are the responses now? I asked you a question on Line 24; "Now I'll get back to my original question, Mr. Brosnam, do you have anything in writing between you and the Brotherhood, which says that you are not to count the time from the day after the letter. Do you have anything in writing?" Your answer was: "I Do Not." Is that correct?

A. That's correct.

Q. Question: "Have you ever seen anything in writing?" Your answer is: "I have not." That's correct, isn't it?

A. That's correct.

Q. Question: "If there is such a writing, where would it be?" Answer: "The agreement apparently was made—I'll put it this way; I don't know where the writing, where the agreement would be. However, more likely it would be in Washington". That's correct, isn't it?

A. That's correct.

[fol. 13] Q. Question: "In what division in Washington"? Answer: "What we call the Labor Relations." That's correct, isn't it?

A. Correct.

Q. Question: "Who is in charge of that division?" Answer: "Mr. Lawson G. Tolleson." That's correct, isn't it?

A. That's correct.

Q. Question: "Lawson G. Tolleson?" Answer: "That's right."

A. Correct.

Q. Question: "Have you ever had the question come up before this case, about the time that's counted from the date you write the letter until you dismiss a man? And your Answer: "Never".

A. That's correct.

J. M. FORD, sworn:

Direct examination.

By Mr. Hardy:

Q. Who is Mr. L. G. Tolleson?

A. Mr. L. G. Tolleson is Assistant Vice-President in charge of Labor Relations of the Southern Railway System.

Q. On August 23, 1957, what was Mr. L. G. Tolleson's title?

A. Director of Labor Relations.

Q. Was he your immediate superior?

A. He was.

Q. Mr. Ford, when such a letter is written, how is the thirty-day period specified in that letter calculated?

Mr. Hamrick: Objection.

The Court: For Firemen?

Mr. Hardy: For Firemen. We are speaking of a letter written under this section of the Firemen's agreement.

The Court: Overruled.

A. Would you repeat the question, please?

Q. Would you read the question please?

(The court reporter reads the question on Line 9 above.)

[fol. 14] The Court: This is, of course, for firemen, not for some other kind of trainmen?

Mr. Hardy: That is correct, sir.

A. Calculated from the day the letter is written, meaning that the first day is the date of the letter.

Q. Is this the uniform and accepted practice in sending letters of this type, Mr. Ford, on Southern Railway Company lines?

A. It is.

Q. Has it ever, to your knowledge been questioned by the Brotherhood of Locomotive Firemen and Engineers who represent firemen on Southern Railway Lines?

Mr. Hamrick: Objection.

The Court: Overruled.

A. Not to my knowledge.

The Court: Have you ever had the question come up before this case where it is of critical importance?

A. Not in my time.

SOUTHERN RAILWAY SYSTEM

Accounting Department

Atlanta 3, Ga. September 26, 1963 weh/df
700-2

Mr. J. A. Chilton
Claim Agent
Southern Railway Company
Charlotte, N. C.

Dear Mr. Chilton:

Your telephone conversation with Mr. VanLandingham and letter confirming conversation on September 25, 1963 in regards to earnings for Roy Edward Walker, SS No. 241-22-4826, Route 1, Ellenboro, N. C. formerly employed by Southern Railway Co., as fireman on Charlotte Division.

Following is the gross earnings for Mr. Walker from 1944 through 1963.

[fol. 15]

Year	*Amount*	*Year*	*Amount*
1944	$1,079.73	1954	$1,040.88
1945	2,468.01	1955	2,291.60
1946	1,911.36	1956	3,321.74
1947	277.48	1957	790.65
1948	7.48	1958	.00
1949	.00	1959	.00
1950	551.24	1960	.00
1951	856.94	1961	.00
1952	2,803.69	1962	.00
1953	1,356.24	1963	.00

In order to get Mr. Walker's earnings from 1944 through 1958 broken down by pay periods it will be necessary for some one to get this information from the records at our warehouse in Macon, Ga.

Yours truly,

H. T. AMY,
Manager, Payroll Accounting.

PLAINTIFF'S EXHIBIT No. 2

Atlanta, Ga., November 10, 1964 H/K
700-2

Re: Roy Walker, SS No. 241-22-4826 vs. Southern
Re: Railway Company, United States District Court,
Re: Asheville, N. C.

Mr. L. G. Tolleson:

Your letter dated October 22, 1964, file LF-6-W-57 requesting certain information in connection with the above.

Listed below you will find, gross earnings by R. E. Walker for the years 1952 through 1957:

Year	*Gross Earnings*
1952	$2,803.69
1953	1,356.24
1954	1,041.88
1955	2,291.60
1956	3,321.74
1957	790.65

H. T. AMY,
Manager, Payroll Accounting.

[fol. 16]

PLAINTIFF'S EXHIBIT No. 1

SOUTHERN RAILWAY SYSTEM

Accounting Department

Atlanta, Ga., December 18, 1964 wsv/b
700-2

TO WHOM IT MAY CONCERN:

THE FOLLOWING IS A TRUE TRANSCRIPT OF EARNINGS, BY YEARS, FOR C. F. ROBINSON, SOCIAL SECURITY NUMBER 239-10-5218, ON FILE IN OFFICE OF MANAGER, PAYROLL ACCOUNTING, ATLANTA, GEORGIA.

Year	*Gross Earnings*
1964	$ 451.53
1963	7,826.69
1962	9,184.31
1961	6,849.44
1960	6,136.00
1959	5,744.68
1958	4,325.80
1957	5,553.84

H. T. AMY,
Manager, Payroll Accounting

SWORN to and subscribed before me
This 18th day of December, 1964.

RUTZ E. DUKES,
Notary Public, Georgia State at Large.
My Commission Expires Nov. 11, 1968.

[fol. 17]

JUDGMENT

Pursuant to memorandum of decision filed herein, It Is Ordered, Adjudged, and Decreed that the plaintiff have and recover of the defendant the sum of $4,500, and the costs of the action to be taxed by the Clerk.

This 16th day of January, 1965.

J. Braxton Craven, Jr., Chief Judge, United States District Court for the Western District of North Carolina.

A True Copy

Attest: Thos. E. Rhodes, By: J. E. Brantley, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

Civil No. 2171

ROY A. WALKER, Plaintiff,

versus

SOUTHERN RAILWAY COMPANY, Defendant.

Heard December 21, 1964

Before Craven, Chief Judge.

Mr. George H. Ward, Asheville, North Carolina, and Mr. Thomas J. Edwards, Rutherfordton, North Carolina, for Defendant; J. Nathaniel Hamrick, Rutherfordton, North Carolina, for Plaintiff.

OPINION—January 18, 1965

This is an action by Roy Walker to recover damages for breach of his employment contract with the Southern Railway Company. Originally filed in the Rutherford County [fol. 18] Superior Court on August 15, 1963, it was removed on petition of Southern, by reason of diversity of citizenship, to this court.

Until his discharge as of 12:00 midnight, May 28, 1957,[1] Walker had been in Southern's employ approximately thirteen years, the latter portion of which he worked as a fireman.

On March 3, 1957, Walker was notified by a crew clerk for Southern that he had been "rolled for a regular job". In less colloquial language this means that Walker was displaced on his job by another fireman because of the latter's higher seniority. Walker then left, saying that he was sick and was going home.

By letter dated April 29, 1957, Walker was informed by J. R. Brosman, Southern's Division Superintendent, that unless he "protected" his seniority within 30 days from the date of the letter his seniority would be forfeited. A postal certificate shows that the letter was received and signed for by Walker's daughter-in-law on April 30, 1957. Walker was in the Gardner-Webb Medical Clinic recuperating from an operation, and did not actually see the letter until May 2, 1957.

As of midnight on May 28, 1957, Southern treated Walker's seniority as having been forfeited. The next day (May 29th) Walker appeared at the office of Southern in Charlotte seeking to protect his seniority, but was told that he had already lost it. Walker subsequently traveled to Greenville, South Carolina, to ask Mr. Brosman to reinstate him. Reinstatement was denied, whereupon this suit to recover damages for breach of contract was instituted.[2]

---

[1] Defendant has not pleaded any statute of limitations. Fed. R. Civ. P. (8).

[2] Walker originally sought reinstatement also. That part of the complaint has been dismissed.

Jurisdiction

If a discharged railroad employee elects to seek reinstatement (with or without back pay), the National Railroad Adjustment Board has primary jurisdiction to the exclusion of both state and federal courts. But if the em- [fol. 19] ployee accepts his discharge as final, and such is the situation here, he may bring an action at law for damages. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950); *Moore* v. *Illinois Central R. R. Co.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941).

Walker did not exhaust administrative remedies available to him under the collective bargaining agreement between Southern and the Union. Southern not unreasonably contends that his failure to do so bars this action, and that exclusive jurisdiction is in the National Railway Adjustment Board. Whether he must show that he has exhausted his administrative remedies under the contract depends upon the applicable state law. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953).

In *Haynes* v. *Winston-Salem Southbound Ry. Co.*, 252 N. C. 391, 113 S. E. (2d) 906 (1960), the North Carolina Supreme Court held that a railroad employee who accepts his discharge as final and brings an action to recover damages for breach of contract is not required to exhaust his administrative remedies before maintaining the action. Southern, in its brief, cites *Charlotte City Coach Lines, Inc.* v. *Brotherhood of Railroad Trainmen*, 254 N. C. 60, 118 S. E. (2d) 37 (1961), for the proposition that North Carolina law *does* require exhaustion of administrative remedies before maintaining an action for breach of contract.

The *Charlotte* case was decided after *Haynes*, but they are clearly distinguishable. *Charlotte* was a suit between an employer and a labor union; the court was primarily concerned with the interpretation of a North Carolina statute providing for *arbitration* of employee grievances. In that case the employee, over whom the dispute arose, was *sus-*

pended from his regular job as a passenger bus driver. He was not discharged.
[fol. 20]

Breach of Contract

Coming to the merits, Walker was discharged for one reason only: his alleged failure to "return to actual service" or report for work prior to the expiration of the 30-day limitation period.[3]

Walker informally notified Southern of his illness and inability to work by having his daughter telephone Southern's yard office in Charlotte on March 7, 1957. Again, on April 9, 1957, Walker, accompanied by his daughter and George Padgett, went to Southern's terminal station in Charlotte to pick up a salary check due him. While there, he told Edward Brinkley, Southern's "Trainmaster", that he was unable to work because of an operation and adhesions.

But, regardless of the effect, if any, of such informal notification, Walker contends that under no circumstances was Southern entitled to take his seniority away from him before the 29th of May, 1957, and the fact that it did so was a violation of his contract. Walker would count the 30-day period from the 29th of April to the 29th of May, *i.e.*, exclude the first day and include the last day.

Southern contends that the proper method of counting the 30-day period is to include the first day (the day the letter was written) and exclude the last day, thereby making the termination date fall on May 28, 1957.

The contractual provision setting forth the 30-day limitation period is silent as to how the period is to be counted.[4]

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[3] It was assumed at the trial, perhaps because of the employment contract, that the discharge was unlawful if Walker reported for work within 30 days of the notice. The trial proceeded on this premise.

[4] The provision appears in a handbook titled: *SCHEDULE OF WAGES and RULES AND REGULATIONS for Firemen, Hostlers and Outside Hostler Helpers.* Article 25(e)(3) provides: "When hired engineers or firemen are laid off on account of reduction in

According to Southern, it has not been interpreted in any judicial or administrative proceeding, nor has it been necessary to do so until now.

Southern officials who testified indicated that the customary practice of the railroad was to include the first and [fol. 21] exclude the last day, and that the Union was not opposed to such practice. But there was evidence to the contrary. Southern's contention is weakened by its admission that never before has time computation been of great importance. Common usage is not established.

Although there is no uniform rule of computing time with respect to the inclusion and exclusion of terminal days, the majority rule is that the time within which an act is to be done is to be computed by excluding the first day and including the last day. 86 C. J. S. 849, "Time" Section 13(1), (3), (7). North Carolina is in accord with this rule.[5] So is the federal practice. *In re Schmidt,* 54 F. Supp. 262 (D. C. Neb. 1944); See Fed. R. Civ. P. (6).

Walker reported for work on May 29, 1957. It is adjudged that this was the last day of the 30-day period within which he was required to report. Southern's forfeiture of his seniority as of May 28, 1957, was, therefore, unlawful and constituted a violation of his contract.

Under North Carolina law the measure of damages for wrongful discharge from employment is the actual damage sustained on account of the breach.[6] "The maximum amount

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service, they will retain all seniority rights; provided, they return to actual service within (30) days from the date their services are required."

[5] N. C. G. S. 1-593 provides: "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

[6] No evidence was offered at the trial bearing upon measure of damages. Sometimes employment contracts provide severance pay in event of discharge. Exhibit "D," has no such provision, nor does it even disclose the duration of the employment contract—itself a damage limitation. See: *Marranzano* v. *Riggs,* 213 F. (2d) 196 (D. C. Cir. 1954); *Enterprise Wheel & Car Corp.* v. *United Steelworkers of America,* 269 F. (2d) 327 (4th Cir. 1959).

recoverable is the difference, if any, between the agreed compensation and the amount the employee earned or by reasonable effort could earn during the contract period." *Thomas* v. *College,* 248 N. C. 609, 104 S. E. (2d) 175 (1958).

"Back pay" is a proper element of the measure of damages in actions for breach of contract of railroad employment. *Mackey* v. *Union Terminal Co.,* 321 F. (2d) 901 (5th Cir. 1963); *Air Line Dispatchers Association* v. *California Eastern Airways,* 127 F. Supp. 521 (D. C. Calif. 1954); *Cook* v. *Des Moines Union Ry. Co.,* 16 F. Supp. 810 (S. D. [fol. 22] Iowa 1936). But Walker has no contractual basis for claiming lost wages as damages *beyond* the date of this Judgment. *Shiels* v. *Baltimore & Ohio R. R. Co.,* 154 F. Supp. 917, 926 (S. D. Ind. 1957).

Moreover, Walker had the duty to mitigate damages, or, put more accurately, his damages are limited to the extent he could have reasonably mitigated them and failed to do so. That is, one injured by the breach will be allowed to recover from the other party only such damages as he could not with reasonable effort have avoided. *Troitino* v. *Goodman,* 225 N. C. 406, 35 S. E. (2d) 277 (1945).

When Walker was discharged in 1957, he was 52 years old and had been working for the railroad about thirteen years. The most he had ever earned was $3,321.74 in 1956. In 1955 he earned $2,291.60, in 1954 $1,040.88, in 1953 $1,356.24, in 1952 $2,803.69, in 1951 $856.94, and in 1950 $551.24. The years prior to that follow a similar income pattern.

It is not easy to seek new employment at the age of 52, but it is not impossible to do it successfully. No evidence was offered in the trial of this case tending to show that Walker made the effort. Walker's appearance and personality is pleasing. He does not appear to be sick, and no evidence was offered tending to show that he has been so ill as to be unable to work since 1957. In my judgment, Walker could have successfully sought other employment and have earned a minimum of approximately $50.00 a week, or $2,400.00 per annum. It is doubtful, in view of his work rec-

ord, that he would have earned substantially more than that amount had he been permitted to continue in his employment with Southern Railway. But the last year (1956) is much more significant than the prior ones. Considering the average income, but weighting the average heavily in favor of the last full years (1956), I draw the inference and find as a fact that but for his wrongful discharge Walker would have earned approximately $3,000.00 per annum as a fireman for the Southern Railway from date of discharge until now. It has not been more than seven and less than eight years since his discharge, and he has lost approximately $600.00 per year. I find that Walker has been dam- [fol. 23] aged in the amount of $4,500.00 by reason of wrongful termination of his employment.[7]

There is no evidence whatsoever to support the prayer for punitive damages, and the court fails and refuses to find that Walker is entitled to recover punitive damages.

It is adjudged that Walker has been damaged in the total sum of $4,500.00. Judgment will be entered that he have and recover of Southern that amount.

This 16th day of January, 1965.

J. Braxton Craven, Jr., Chief Judge, United States District Court for the Western District of North Carolina.

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[7] It is unnecessary to decide whether lost fringe benefits, *e.g.*, retirement and disability compensation, etc., should be considered as damage elements for the reason that no evidence was offered to show the value of same, even to show that such benefits were lost.

[fol. 24]

Appendix to Brief for Appellee

[fol. 25]

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT BETWEEN SOUTHERN RAILWAY COMPANY AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ARTICLE 25

ASSIGNMENTS

(a) REGULAR ASSIGNED MEN DOING EXTRA WORK, ETC.

(1) Passenger firemen will not be required to run freight trains, and will not be called to do extra passenger work except in cases of emergency.

(2) Firemen, passenger, freight, and yard, assigned to regular runs or service will be allowed to take their runs regardless of engine.

(3) Firemen running passenger trains one way and freight trains the other, will be considered as passenger men.

(b) EXTRA BOARDS

EXTRA PASSENGER BOARDS

(1) On divisions where passenger business will justify, there shall be an extra passenger list assigned. Such firemen will run first-in, first-out passenger service, except [fol. 26] that a fireman catching a regular run will hold such run until the regular fireman returns to work, except that he may claim another vacancy in passenger service. Firemen assigned to extra passenger service will hold rights over all other firemen in such service.

EXTRA HOSTLER BOARDS

(2) At points where hostler service will justify, there shall be an extra hostler list assigned. Such hostlers will

work first-in, first-out, in hostler service, except that a hostler catching a regular job will hold same until the regular hostler returns to work, except that he may claim another vacancy in hostler service.

(3) Hostlers assigned to extra service will hold rights over all other hostlers in such service.

(c) FIRST-IN FIRST-OUT

Freight firemen not assigned to regular runs or service, will be run first-in, first-out, in freight service, except as provided in Article 26, Section (c), paragraphs (1), (2) and (3).

(d) WORK TRAINS

(1) Regular firemen will not be called for work train service when extra men are available. In case extra men are not available, the youngest regular man will be called for this service.

This rule will not debar a regular fireman from claiming work train service when bulletined.

(2) When a work train has been in service for a period of six days, it will be considered a permanent vacancy and filled in accordance with the rules. (It is understood that under this rule no deadhead compensation will be allowed to either the men that take the positions or the men that are relieved from the positions.)

[fol. 27] (3) Work trains operated exclusively within yard limits at division terminals shall be manned by yard firemen, except that firemen regularly assigned to road work train service in accordance with the rules may be used in yard work train service for a period of three days or less; work train rates to apply.

(4) Work trains operated partly in yard limits at division terminals and partly on line of road (line of road

being outside of yard limits) shall be manned by road firemen; work train rates to apply.

(5) Work train rates to apply on any day combined switching and work train or wrecking service is performed.

NOTE: Understood and agreed that in the administration of this rule, if a crew is required to assist another crew in rerailing an engine or car when the derrick or tool car is not used, they will be paid work train rates provided thirty (30) minutes or more of their service is utilized in such rerailing; if derrick or tool car is used, work train rates will apply regardless of amount of time consumed.

NOTE: See letter dated August 7, 1928, on page 92.

NOTE: See memorandum of understanding on page 93.

(e) Reduction of Working Lists

(1) When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working lists on any seniority district, those taken off may, if they so elect, displace any fireman their junior on that seniority district under the following conditions:

(2) When reductions are made, they shall be in reverse order of seniority, except as provided in paragraph 8, Article 26 (e), when in effect. No reductions will be made so long as those in extra passenger service are averaging the equivalent of 4,000 miles per month; in pooled, chain gang or any other unassigned service paying freight rates are averaging the equivalent of 3,200 miles per month; [fol. 28] on the road extra list are averaging the equivalent of 2,600 miles per month; on the yard extra list are averaging the equivalent of 26 days per month.

(3) When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required.

(4) Engineers or firemen taken off under this rule shall be returned to service as engineers or firemen in the order of their seniority and in their respective class of service, as soon as it can be shown that men in extra passenger service average the equivalent of 4,800 miles per month; in pooled, chain gang or any other unassigned service paying freight rates average the equivalent of 3,800 miles per month; in road extra service average the equivalent of 3,100 miles per month; in yard extra service average the equivalent of thirty-one (31) days per month.

Note—It is agreed that extra road men in freight service shall be required to stop off so that earnings or equivalent thereof will not exceed 3,800 miles per month. Yard extra men shall similarly be required to stop off so that earnings or equivalent thereof will not exceed 35 days per month.

(5) In returning engineers and firemen to service under paragraph 4 and the note thereunder, sufficient number of men will be added to the working list to keep the mileage between the maximum stipulated in paragraph 4 or the note thereunder, and the minimum stipulated in paragraph 2. If an additional assignment would reduce the mileage below the minimum stipulated in paragraph 2 for the same class of service, regulation will be made by requiring each man in the class of service affected to lay off when he has earned the equivalent of the maximum mileage stipulated in paragraph 4, or the note thereunder.

Note—Under the provisions of this paragraph (5) it is understood that if at a checking period it is found that [fol. 29] the mileage in a pool averages the equivalent of 3,800 miles per month and a man could not be added to the pool without reducing the av rage mileage below 3,200 miles per month, regulation will be effected in the following checking period by taking the individual man off when he has made the equivalent of 3,800 miles per month.

(6) After all engineers or firemen have been returned to service, the following regulations will apply with respect to further additions to the working lists:

In the regulation of extra passenger service, sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in pooled, chain gang or any other unassigned service paying freight rates, 3,200 and 3,800 miles per month; in road extra service, 3,100 and 3,800 miles per month; in yard extra service, 31 and 35 days per month.

(7) When the mileage of men in either of the classes of service specified in paragraph 6 averages in excess of the maximum stipulated therein, and an additional assignment would reduce the mileage below 4,000 miles per month in extra passenger service; 3,200 miles per month in pooled, chain gang or any other unassigned service paying freight rates; 3,100 miles per month in road extra service; or 31 days per month in yard extra service, regulation will be made by requiring each man in the class of service affected to lay off when he has earned the equivalent of the maximum mileage stipulated in paragraph 6.

Note—Under the provisions of paragraph 6, it is understood that if at a checking period, it is found that the mileage in extra passenger service averages in excess of the equivalent of 4,800 miles per month; in pooled, chain gang or any other unassigned service paying freight rates averages in excess of the equivalent of 3,800 miles per month; in road extra service averages in excess of the [fol. 30] equivalent of 3,800 miles per month; in yard extra service averages in excess of the equivalent of 35 days per month, and if regulations cannot be made by assigning men without reducing the average below the minimum as set forth in paragraph 6, then regulations will be effected in the following checking period by taking the individual man or men off, so that earnings will not exceed the maximum for each class of service as set forth in paragraph 6.

(8) In the regulation of assigned passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned service paying freight rates, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 3,200 and 3,800 miles per month. To keep within the mileage limitations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger, or 3,800 miles in the other assigned service, will not be exceeded.

(9) In assigned yard service, regulation will be made by requiring each regularly assigned man to lay off when he has earned the equivalent of 35 days per month.

(10) Maximum stipulated for freight service (3,800 miles) or the equivalent thereof, shall apply to Engineers and Firemen performing a combination of service.

(11) In regulating the working lists in the respective classes of service, each list will be handled separately, neither a minimum nor maximum being guaranteed.

(12) General committees will agree (among themselves) upon a stipulated period for checking and regulating the mileage each month; provided that the period must be 10, 15 or 30 days. Failing to mutually agree, the 15 day period applies. Arrangements to enable proper checking of the [fol. 31] mileage of engineers and firemen by committees will be made between the railroad officials and committees. All mileage records will be made available to either and/or both committees. When the mileage has been checked and the number of crews assigned in accordance with mileage limitations, there will be no further computations or adjustments made during the same period.

(13) There should be a uniform application of these mileage limitations for both engineers and firemen in the same class of service.

ARTICLE 32

REPRESENTATION AND ADJUSTMENT MATTERS

(a) REPRESENTATION

The right of any engineer, firemen, hostler or outside hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the general committee making the same, is conceded.

(b) GRIEVANCES

(1) No grievance will be entertained unless presented in writing to the Superintendent within sixty day after its occurrence by the fireman, hostler, outside hostler helper or the committee of his choice. Firemen, hostlers, and outside hostler helpers shall have the right to appeal to the next ranking officer, provided such appeal be made in writing within sixty days after the Superintendent has rendered his decision to the fireman, hostler, outside hostler helper or the local committee representing him.

(2) The word "grievance" as used in paragraph next above refers to and covers all matters arising under schedule rules including, but not limited to, matters such as discipline and time claims. To be entertained must be pre- [fol. 32] sented in writing to Superintendent within sixty days after its occurrence, and, in event adjustment be requested which involves a money payment, the period covered by such adjustment cannot antedate a date sixty days prior to the date upon which such claim is filed.

(3) Claims involving time payments in other than discipline cases shall be deemed to have been filed when a time ticket is filed with the Superintendent or other proper officer to whom such time tickets are sent by employees involved. If declined by Superintendent, must be further handled or appealed in writing within sixty days. If not handled or so appealed within such sixty days, further handling is barred.

(4) Appeals, to be recognized under the statute of limitation rule, must be made in writing within sixty days from the date of final decision by any officer to whom an appeal has been made to the next ranking officer to whom appeal is to be made until such appeal reaches the highest ranking officer authorized to pass on such appeals. If not so appealed, further handling is barred.

(5) When erroneous over-payments are made, no retroactive adjustments will be made for a period of more than sixty days prior to the date such erroneous payments are discovered and employees notified that such adjustments are to be made.

NOTE: Section (b) effective August 1, 1944.

(c) COMMITTEES

Properly constituted committees of firemen or hostlers, desiring to present any matter to any proper official, will be granted leave of absence as soon as possible after application has been made.

(d) DISMISSAL FOR COMMITTEE WORK

No fireman or hostler will be dismissed from the service of the Company for serving on an adjustment Committee.

[fol. 33]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

J. R. BROSNAN, called by the plaintiff as an adverse witness, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hamrick:

Q. Mr. Brosnan, I'll ask you and let you refresh your recollection from looking at your deposition which is signed here, sir . . . do you have a copy of the deposition?

A. I do.

Q. I direct your attention to Page 11, Mr. Brosnan. In answer to my question at the deposition which reads as follows: "Mr. Brosnan, let me ask you this, is there a letter anywhere in the personnel file of Roy Walker from Dr. Harris directed to Mr. Edward Brinkley, telling Mr. Brinkley Mr. Walker was under his care and unable to work?" I'll ask you if your answer wasn't then and isn't now: "I am familiar with that but I will state this, that if he had a telephone that all he had to do between the time he received the letter, which was dated April 29, 1957, was to call the Call Office or to talk to Mr. Brinkley personally since he worked directly under Mr. Brinkley and so notify him." That was your answer then and I take it your answer now?

A. It is not, Mr. Hamrick, you read this wrong. You said, "I am familiar with that" and it says "I am not familiar with that".

Q. I beg your pardon, I did leave out "not." "I am not familiar with that". That's your answer?

A. That's right.

Court: Who is Brinkley?

Mr. Hamrick: He was Terminal Trainmaster at the time, is that right, Mr. Brosnan?

A. That's right. He's here, Your Honor.

Q. Mr. Brosnan, I'll direct your attention to Page 27 of the deposition and ask you that if in response to my question which reads as follows: "Mr. Walker did report in [fol. 34] for duty the day after you contend his seniority was taken, didn't he?", and I'll ask you if you didn't answer that on Page 28, "That is my understanding.", and if that is not your answer now?

A. That is correct.

Q. Now, I continue to direct your attention to Page 28 of your Adverse Examination and ask you if you didn't make the following responses to the following questions which I asked you and if those aren't your answers now; Question on Line 11: "You have any reason to want to discharge him except he didn't report for seniority?" I'll ask you if your answer to the question was not: "No, sir, we needed him or we would never have given him the thirty day notification to return to duty." That was your answer then and now?

A. That is right.

Q. All right, sir, on Line 15, question: "You had no other reason for wanting to discharge him at all?" I'll ask you if you didn't answer that, beginning with Line 7: "That's right. I don't know the man personally and he'll admit it. I don't know him personally and I don't have any grudge against him. In other words, I was carrying out the provisions of the work agreement when I wrote the letter."

A. That's correct.

Q. Question beginning on Line 22: "Now, Mr. Bosnan, when you wrote him the letter you needed him?" Answer: "Yes, sir." That's correct, isn't it?

A. That's right.

Q. Beginning on Line 25 of Page 28: "There's nothing in his personnel record that would show that you were wanting to discharge him for anything?" Your answer on Page 29: "I had no reason to discharge him other than carrying out the provisions of the working agreement." Did you answer it that way?

A. That's correct. However, right there I want to introduce this in here.

Mr. Hamrick: Objection.

Court: Objection overruled. Go ahead.

A. I want to introduce in here that he was not discharged from service.

[fol. 35] Q. He was not discharged from service.

A. That is correct. He forfeited his seniority on his own according to the working agreement.

Court: I didn't get your name correctly nor your title. Would you give it to me?

A. J. R. Brosnan, Superintendent.

Court: Superintendent of what?

A. What is known as the Charlotte Division.

Q. Mr. Brosnan, you did write him a letter on May 30, 1957, didn't you?

A. May I see the letter?

Q. I'll hand you the allegations in Southern Railroad's answer and you may refresh your recollection.

A. I want to see the letter, please.

Q. I don't think it's necessary to cross examine this witness about that. Mr. Brosnan, I direct your attention to Page 30 of your deposition, Line 14, and ask you if you didn't make the following responses to the following questions and if they are not your answers now. On Line 14 the question: "Mr. Brosnan, as far as you're concerned, except for being a day late you had no reason to discharge Mr. Walker?" Answer: "He failed to carry out the provisions of the working agreement described in my letter." That was your answer then and now?

A. Described in my letter to him.

Q. Question: "I understand that. I mean aside from that, Mr. Brosnan, aside from that did you have any other reason for wanting to discharge him?", and your answer was, "No, sir." That's correct, isn't it, sir?

A. That's correct.

Q. Question on Line 23: "You had no other reason for wanting to discharge him?" Answer: "As a matter of fact, we needed him for service to eliminate what we call doubling which costs the Southern Railway time and a half whenever a man doubles within 22½ hours." That was your answer, was it not, sir?

A. That's right.

Q. Mr. Brosnan, I direct your attention to Page 36 of your Adverse Examination, Line 18 . . . beginning Line [fol. 36] 15, and ask you if your answers to the questions weren't as I read them now. Question: "When a man is removed from your seniority list he is stricken from the list on that book, isn't he?" Your answer on Line 17: "That's right." That was your answer, is that correct?

A. That's correct.

Q. Line 18, question: "When did the Call Clerk strike Mr. Walker's name from the list on that book?" Your answer on Line 20: "When I notified him." That's correct, isn't it?

A. That's right.

Q. Line 21: "When did you notify him?" Your answer is: "May 29." That's correct, sir?

A. That's right.

Q. Question on Line 25, Page 36: "You notified the Call Clerk in Charlotte and these other few places on May 29 and on May 29 they struck his name from the seniority list?" Your answer: "That's right." That's correct, isn't it, sir?

A. That's right.

Mr. Hamrick: I believe that's all the questions I want to ask this witness on adverse examination, sir.

Court: All right.

Mr. Ward: If Your Honor please, to examine this witness at this time I'd have to go into many matters that I don't think would be germane until the plaintiff has gone on the stand.

Court: Then let him come down and you can put him up again.

Mr. Ward: All right.

Court: When this case started out it also sought reemployment for Walker. Is that part of the case now before the railroad adjustment board?

Mr. Hamrick: No, sir.

Court: Has it ever been before the railroad?

Mr. Hamrick: No, sir. We abandoned it in this court and it has never been before them.

Court: Do you have any more oral testimony?

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[fol. 37] Roy Walker, the plaintiff, having first been duly sworn, was examined and testified as follows:

Direct examination.

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Court: Whatever happened to the copy of the letter Dr. Harris made? Do you know anything about the copy?

Q. The copy that you took to Charlotte on the 29th, where is that copy?

A. I wrote a grievance to Mr. E. C. Bradley at 304 W. Arrow St. at Greenville and gave him that copy of that letter.

Q. Who wrote the grievance for you?

A. Mr. J. C. Adams.

Q. Did you mail that letter with the grievance in it?

A. I mailed it.

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Cross examination.

By Mr. Ward:

Q. What day did you go to work for the railroad, Mr. Walker?

A. 1944.

Q. Worked off and on up until March, 1957, didn't you?

A. Yes, sir.

Q. Now, as I understand you, on March 3, 1957, a fireman who was senior to you rolled you?

A. Right.

Q. And you went home then?

A. Yes, sir.

Q. You had been rolled before and you knew what that practice was?

A. Absolutely.

• • • • • • •

Q. All right. You didn't mark up on the extra board when you were rolled?

A. No, sir.

Q. You didn't notify any of your superior officers that you were going home or going to the hospital, did you? [fol. 38] A. The only man that I said it to was the Crew Clerk.

Q. Where was he?

A. He was sitting behind the desk.

Q. And you said you was sick anyhow and was going home?

A. I said, "I'm sick, I'm going home."

Q. And that's every word that was said, wasn't it? I'm sick and going home, that's all you said?

A. As well as I remember, yes, sir.

Q. Didn't tell him you was going to any hospital?

A. Well, I didn't know I was going to the hospital at that time.

Q. You did work every day and expected to come back in a day or two, didn't you or did you?

A. I expected to place myself on the extra board, yes, sir.

Q. Expected what?

A. I expected to go on the extra board, yes, sir.

Q. Well, you didn't mark up on it?

A. No, sir, I was sick.

Q. You expected to go on the extra board?

A. Yes, sir.

Q. Well, now, what effort on your part, what did you do to mark up on the extra board?

A. Well, you just go in and tell the Clerk to mark you up on the extra board.

Q. And you didn't do that, did you?

A. No, sir.

Q. Well, you never wrote your Trainmaster . . . you're immediately under the Trainmaster, were you?

A. Yes, sir.

Q. You never wrote the Trainmaster when you got home about being sick, did you?

A. No, sir.

• • • • • • •

Q. And you got a letter from the railroad to report to work on what date?

A. No answer heard.

Q. To protect your seniority.

A. It was postmarked the 29th day of April and said within thirty days.

Q. You got it the same date, didn't you?

A. No, sir.

Q. Who is Mrs. C. H. Walker?

A. My daughter-in-law.

Q. It was signed for on April 30?

A. Yes, sir.

[fol. 39] Court: When do you say you got it, what day, if you did? When did you get that letter?

A. I was in the hospital when my daughter-in-law signed for it.

Court: I say, when did you first see it?

A. I saw it about the 3rd day of May.

Q. You got it the next day after your daughter did, didn't you?

A. No, sir.

Q. Didn't you tell me that when I took your deposition?

A. No, sir, I did not tell you that.

Q. You got it, though, on the 3rd?
A. No, sir.
Q. What date did you get it?
A. I got it about the 3rd or 4th day of May.

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J. R. Brosnan, having previously been examined by the plaintiff as an adverse witness, and having been sworn, resumes the stand as a witness for the defendant, was examined and testified as follows:

Direct examination.

By Mr. Ward:

Q. Mr. Brosnan, I believe you were on the stand this morning.
A. That's correct.
Q. Stated you were Superintendent of the Southern Railway Company back in March, 1957.
A. That's correct.
Q. Offices at that time at Greenville.
A. Still is at Greenville.
Q. Now, you were asked this morning, Mr. Brosnan, about writing the letter of April 29 to the plaintiff, Mr. Walker. Is that a copy of the letter that you wrote him?
A. Yes, sir.
Q. I believe you showed on the face of the letter that you sent a copy of it to E. C. Bradley, Local Chairman of the Brotherhood.
A. That's correct.
Q. Was that mailed to Mr. Bradley?
A. Yes, sir.
[fol. 40] Q. I wish you'd say whether or not you got a receipt showing that letter had been received. Did you register it?
A. Yes, sir.

Mr. Hamrick: The receipt would be the best evidence. I'd like to have it in evidence and I would like to see it myself. I got a copy I never could read.

Court: What's the date of this letter?

Mr. Hamrick: April 29th, delivered April 30th.

Court: Has this one been given an exhibit number, the April 29th letter?

(Defendant's Exhibit #1 marked for identification.)

A. What was the question?

Q. If you registered this letter or had a return receipt from him.

A. Yes, sir. This registered letter was registered under Certified #804699 and we received this receipt back at Greenville and on the number one on the back side of this is signed "R. E. Walker" and on line two it's signed "Mrs. C. H. Walker".

Mr. Hamrick: I take it you're going to offer that.

A. The date is April 30, 1957.

Q. The date of the letter.

A. The date she signed her name to the receipt.

Q. The same date of the letter.

A. April 30, 1957.

Mr. Ward: I offer this Exhibit #2.

(Defendant's Exhibit #2, receipt, received in evidence.)

A. No, sir, it's not the same date as the letter. The letter is dated April 29, 1957, and the receipt, which is signed by Mrs. Walker, is April 30, 1957.

Q. I beg your pardon, it's my mistake, not yours. Mr. Brosnan, after the mailing of that letter state whether or not Mr. Walker responded to that letter by either answering it by mail or protecting his seniority or taking any other action in connection with any responsibility he owed to the railroad.

A. Mr. Walker at no time between the time of April 29, [fol. 41] when this letter was written, and within thirty

days contacted my office by telephone or by letter, during the thirty-day period that he had to return for duty.

Q. His having failed to respond to your notice to protect his seniority, state what you then did.

A. On May 30, 1957, I wrote Mr. Roy Walker, Route 1, Box 102, Forest City, North Carolina, "Dear Sir: Please refer to my letter dated April 29, 1957, advising you to protect your seniority within 30 days. You did not report and protect your seniority as instructed and this is to advise you under the provisions of the Firemen's Agreement, Article 25 (e) 3, that your name has been stricken from the Firemen's Seniority List and you are no longer considered an employee of the Southern Railway Company. Please turn in all company property you have in your possession to Terminal Trainmaster, Curlee. Yours Very truly, Superintendent", with a copy of this letter to Mr. Curlee, Mr. Webb and Mr. Wheeler.

Mr. Ward: We offer that letter as Exhibit 3.

(Defendant's Exhibit #3 received in evidence.)

Q. Mr. Brosnan, that's the receipt for that last letter. Did you register it?

A. Yes, sir.

Court: Let me see Exhibit 3, please. (It is handed to the Court.)

A. The letter which I just read into this trial was certified under #804695 and was signed by Mr. R. E. Walker. It was delivered apparently on May 31, 1957.

Court: Mr. Brosnan, let me ask you this; in Exhibit 3 the words "protect your seniority" appear; also in Exhibit 1 the words "unless you protect your seniority", what's meant by those words with respect to this case? I can imagine it may mean a whole lot of things but with respect to this case would it have protected Walker's seniority if he had come in during this thirty-day period or written and said, "I'm sick in the hospital", and so on?

A. That is correct and he should have written me and answered my letter.

[fol. 42] Court: Is it fair to say that if he had gotten notice to you or, well, say Brinkley, wasn't Brinkley his Crew Chief or something?

A. Brinkley was the Terminal Trainmaster at Air Line Junction, Charlotte.

Court: If he had written you or Brinkley that he was sick, unable to work, in the hospital, do you say that would have protected his seniority?

A. Your Honor, I'm the only one in the Charlotte Division that would be allowed to write that letter that you see there. Therefore, he should have answered that letter back to me or else phoned me.

Court: I realize that but I notice on Exhibit 1 you are asking Brinkley to "let me know if and when Fireman Walker reports."

A. That's true. What he could have done right there, he could have marked up for work at Air Line Junction. That was the reason I put that on the bottom.

Court: Just suppose—I'm being hypothetical on purpose—suppose he had written you, I know that he didn't, he doesn't even say that he did, but just suppose he had written you during the period and said that he was sick and in the hospital, would that have extended the thing another thirty days or sixty days or six months or what?

A. Well, he wouldn't have forfeited his seniority, I'll say that. Of course, what we would do in there, Your Honor, is we need the man for work, he stood for work, the junior man or the man immediately under him on the seniority roster was working, so that showed that he had . . .

Court: But that doesn't answer my question. Suppose, in response to Defendant's Exhibit #1, Mr. Walker had written you like you say he should have done and says, "I'm sick, I'm in the hospital, I can't work."?

A. That would have taken care of the situation.

Court: I know it would but what I want to know is for how long? It would run out some day. If you didn't hear from him again sometime it's back where it was or you would have had to write him another letter. Is that it?

A. Yes, sir, that's right.

[fol. 43] Court: Thank you, sir.

Q. I believe I had asked you a question, had you answered it, whether he had responded or answered your letter or protected his seniority?

A. At no time did he ever write me or answer this letter or did he ever call my office or notify anyone on the Southern Railway on the Charlotte Division during this period of thirty days which he had to protect his seniority and this is according to the working agreement.

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Mr. Hamrick: Yes, sir. I don't claim we exhausted administrative remedies. I will stipulate that we did not exhaust them.

Court: All you contend is what I stated previously. I'll let you state it, you can state it more accurately. State it for us and then we can agree on it.

Mr. Hamrick: I contend essentially two points wrapped up in three things. One is that Mr. Walker went to Mr. Brinkley and told him that he was in the hospital. Another is that Dr. Harris gave Mr. Walker a letter saying that Mr. Walker was unable to work on May 11 or 12, in there, and mailed that to the railroad.

Court: And the first one was April 9?

Mr. Hamrick: April 9, yes, sir. The other contention is that they took his seniority before the thirty days ran out.

Court: And those are your only contentions?

Mr. Hamrick: I don't contend that we exhausted the administrative remedies and on those contentions I base my case.

Court: And subsequently there is no evidence and it is stipulated there is no evidence tending to show that he did anything else in June, July or August or whenever, that might be required, as the railroad would contend, by the contract. Now, doesn't that simplify it?

Mr. Hardy: Yes, sir, I think it does. We were of the impression that Mr. Hamrick's position was that he, because he said in the complaint that he did everything he [fol. 44] knew how to do or something to that effect, that he was contending that he had complied with all that was required from him under the contract. If he is going to stipulate that he did not or his client did not comply with all that was required of him to process the claim in accordance with the contract, that's very well indeed.

Court: All we're trying to do now is tie the facts down. He denies he has to do anything under the contract to bring this lawsuit, as I understand it. But I think it's fair to say that if the Court concludes that the contract requires other conduct by Walker, then Walker concedes he didn't take those steps or make those actions. Is that a fair statement, Mr. Hamrick?

Mr. Hamrick: Yes, sir, a fair statement of it.

Court: But, of course, Walker contends there is nothing else required except the evidence you have offered.

Mr. Hamrick: Undoubtedly after June we went back to talking to the officials of the railroad to come to an agreement on the matter. We did not follow the administrative procedures between the brotherhood and the railroad. We did not do that and we don't contend that we exhausted the administrative procedures. We contend that it is not necessary.

Mr. Ward: Certainly through the Superintendent until denied and then they took it to the General manager and that was denied and then they quit. I am sure Your Honor is familiar with the case of Justice against the Railroad.

Court: All right, maybe this pinpoints the fact questions a little better.

Mr. Hardy: I don't believe it will hurt anything to have them and it may clarify it. It is our position that the first letters written by Mr. Morrow were written within the time that steps were required to be begun but that those steps required under the contract were not completed. This may or may not make a difference in Your Honor's ultimate decision on the law question.

[fol. 45] Mr. Hamrick: If we started compliance with the administrative procedures and didn't comply, how is that different from not starting. In other words, I am perfectly willing to say that we did not exhaust our administrative remedies. If we started and quit or didn't start, I don't know why it would make a difference. If it's required that we exhaust administrative remedies before we sue, we didn't do that.

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EDGAR BRINKLEY, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Edwards:

Q. Give us your full name, please, sir.
A. Edgar Brinkley.
Q. Are you hard of hearing, Mr. Brinkley?
A. Yes, sir, I wear a hearing aid.
Q. Are you now working with the railroad?
A. No, I'm retired.
Q. When did you retire, Mr. Brinkley?
A. Effective with the hour of midnight May 15, 1957.
Q. Were you working with the railroad during the month of March, 1957?
A. Yes, sir.
Q. Did you retire about that time?
A. I retired in May, 1957.
Q. What day in May did you retire?

A. May 15.

Q. That was between the period of the notice that was spoken about a while ago, between April 29 and May 29?

A. Yes, sir.

Q. You retired. Now, who took your place? Was it Mr. Curlee?

A. Mr. Curlee, that's right.

Q. Mr. Curlee took your place along about the 15th of May, 1957.

A. That's right.

Q. What was your position with the railroad up until [fol. 46] your retirement?

A. Terminal Trainmaster at Charlotte.

Q. Charlotte Division?

A. Charlotte Terminal.

Q. Is that the one that has been referred to here before as the Air Line Junction?

A. Yes, Air Line Junction Yard.

Q. Now, what were your duties as Terminal Trainmaster, Mr. Brinkley?

A. We are responsible for the operation of the terminal.

Q. What do you mean by the terminal?

A. Railroad terminal, switching yards, passenger station, trains going through, freight trains coming in and being switched up and going out.

Q. As Terminal Trainmaster were you acquainted with the plaintiff Roy Walker?

A. Yes, sir.

Q. How long had you known him?

A. Well, since he came to Charlotte. I think it was about 1944, something like that.

Q. I don't know whether I asked you this or not, when did you come to the Charlotte Division?

A. I come down in 1948.

Q. Was that prior to the time that Mr. Walker came to the Charlotte Terminal? In other words, I'll put it this way, was that prior to the time that Mr. Walker established seniority as a yard fireman on the Charlotte yard?

A. Yes, sir.

Q. Do you recall what date that was?

A. No, sir, I don't.

Q. Do you recall the year that he established yard seniority on the Charlotte yard?

A. No, sir.

Q. During that period that he worked on the Charlotte yard you were Terminal Trainmaster the whole period up until such time as you were relieved by Mr. Curlee, is that correct?

A. That's right.

Q. And you had many occasions to deal with Mr. Walker in connection with his work as a yard fireman?

A. That's right.

[fol. 47] Q. And were you Mr. Walker's immediate superior?

A. Yes, sir.

Q. Now, Mr. Brinkley, have you since you have been associated with the railroad ever been a member of the Brotherhood—I don't recall the name of the Brotherhood but the union Brotherhood?

A. Well, not of the operating Brotherhoods.

Q. Have you ever been a member of any railroad Brotherhood in connection with your railroad work?

A. About 47 years ago now.

Court: Let's go on to something else.

Q. Have you, prior to this time, as a member, if you were a member of the railroad Brotherhood, had occasion to have this question of this thirty-day notice explained to you by your employers and your Brotherhood?

A. When I was a member of the Brotherhood?

Q. Yes, sir.

A. No, sir, I was not a member of that union.

Q. Well, did the union of which you were a member explain the method of determining . . .

Mr. Hamrick: Objection.

Court: Sustained.

Q. Since you've become an officer, so to speak, of the railroad, have you had occasion to deal with the method of determining the thirty-day notice?

A. Oh, yes, sir.

Q. Served under this contract.

A. Yes, sir.

Q. Are you familiar with this contract?

A. Well, I was when I retired.

Q. Between the firemen and the railroad?

A. Yes, sir.

Q. How long have you worked under that contract?

A. Well, this contract has been in effect since 1929.

Q. Well, has it been amended from time to time?

A. It's been amended, yes, sir.

Q. But you are familiar with the terms of this contract?

A. Yes, sir.

Court: Gentlemen, I don't want to cut you too short [fol. 48] but you've got in evidence now the railroad's understanding of the contract. That's been testified to, the way they understand it, and testimony about custom so I don't hardly see what else you can do with it. It's a matter of interpretation.

Mr. Edwards: I was going to show additional testimony on that point.

Court: Let's come quickly to that.

Q. What is your understanding of the method?

A. When it is necessary to order a member of the Firemen's organization back to work, why he is given a thirty-day notice similar to the one that was written in this case and the date of that letter is the first day of the thirty-day period and he must return to duty within thirty days if he protects his seniority.

Q. Now, assuming that you include the first day when would be the hour that that thirty-day period would end?

A. In this particular case the hour of midnight May 28.

Q. In other words, one minute before midnight of the 29th in the morning?

A. Yes, sir.

Q. Now, Mr. Brinkley, during the time that you were Terminal Trainmaster between May 3, 1957, and the date you retired, did you see George Walker?

A. Not that I remember.

Q. Did you have any conversation with him?

A. Not that I remember.

Q. I meant Roy Walker, the plaintiff.

A. Not that I remember.

Q. Did he come to see you during this period of time?

A. If he did, I don't remember.

Q. Did he come to see you at any time after the date he was rolled or marked off the regular board?

A. Not that I remember, no, sir.

Q. Did he, after he was rolled and marked off the regular board, did he place himself on the extra board?

A. No, he did not.

Q. You would know that if he had?

A. Yes, sir.

[fol. 49] Q. Did he come to see you about being sick and bring his daughter over or anything like that while you were there?

Court: April 9, 1957.

A. Not that I remember, no, sir.

Q. Did he bring any doctor's certificate to you or did he mail any doctor's certificate to you?

A. No, sir.

Q. From any doctor saying he was sick?

A. No, sir.

Q. You don't know anything about a doctor's certificate?

A. No, sir.

Q. Did he make a telephone call to your office or were you informed by any personnel in charge that you had received a telephone call from either Mr. Walker or his daughter?

A. No, sir.

Q. During that period prior to the time you were relieved by Mr. Curlee?

A. No, sir.

Q. Mr. Brinkley, these records that are kept of telephone calls and records with reference to the calling of crews and all, do you keep a check on those every day?

A. Keep a check on the crew sheet every day.

Q. Now, does the crew sheet show all matters that might come up pertaining to any telephone calls, for instance?

A. No, sir.

Q. Would it contain a telephone call had there been one made?

A. No, sir.

Q. Where would that be?

A. It wouldn't be any record of a telephone call made except a man calls up to mark off.

Q. That's what I'm getting at. Say he marked off on account of being sick, where would that record be kept?

A. That's on the crew sheet.

Q. Now, how often do you examine the crew sheet?

A. At least two and three times a day.

Q. In other words, you examine it for each three shifts during a 24-hour period?

A. During the first and second shifts and quite often on the third [redacted]t.

[fol. 50] Q. Do you have any recollection of seeing any record made of any telephone call made during that period between March 3 and the day you were relieved by Mr. Curlee?

A. No, sir. No, sir.

Q. And I believe you said you received no letters.

A. The status on the crew sheet at that time would have been shown as just off.

Q. In other words, had a call been made he would have been marked off?

A. When he was rolled from a regular job and stood for the extra board to work and told the Crew Clerk that he was sick and wanted to go home, if that's what he told him, then he would have been marked off on the crew sheet.

Q. And in that event he would have not marked up for the extra board, is that true?

A. That's true.

Q. If he made no such statement, then what would have been his duty with reference to the extra board if he wanted to work?

A. Please say that again.

Q. If he made no such statement, in other words, if he, of his own accord, said he was sick and went home and didn't mark up for the extra board.

A. Then he is just marked off.

Q. In that case, if he expected to work, what would he have to do with reference to the extra board?

A. He would have to mark up.

Q. Otherwise what?

A. If we needed men, we would write him a notice to return to work.

Q. Within thirty days from the date of what date?

A. The date of the letter.

Q. His services were required is the way the contract reads.

A. That's right.

Court: When you want somebody to come back to work on the railroad you don't ever write them and say come back tomorrow or as soon as you can? You want them bad but you don't write them that ever?

A. Your Honor, you have to write that in a certain way because if they don't return by the thirty day time they lost their seniority.

[fol. 51] Court: I know that but I'm asking if you want a man and need him you still write just this language: "This is to advise that you stand for work on your seniority", you don't say, "We need you now, come back tomorrow", you don't ever do that.

A. No, sir. You have to stipulate a date or stipulate the rule or order them back within thirty days. That is

regular procedure I guess on every railroad in the United States.

Court: I don't doubt that part. What I'm wondering about is you can never go beyond that and say we need you and please come back tomorrow. You can't add anything to the letter.

A. No, no, sir.

Q. If a call had been made by a man saying that he was sick, what would be marked on your records? What record would be made of that?

Mr. Hamrick: Objection.

Court: Overruled.

Q. What is the normal procedure in case a man calls up and says he's sick, what do you do?

A. The Crew Clerk marks him off, puts him on the off side.

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W. E. CURLEE, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Edwards:

Q. What are your initials, Mr. Curlee?

A. W. E. Curlee.

Q. Did you work for the Southern Railway?

A. Yes, sir.

Q. When did you begin to work for the Southern Railway?

A. Since 1937.

Q. Did you enter the service of the Southern Railway at the Charlotte Yard?

A. No, sir.

Q. Did you relieve somebody at the Charlotte Yard?

A. Yes, sir.

Q. Who did you succeed?

A. Mr. Edgar Brinkley, Terminal Trainmaster.

[fol. 52] Q. The man on the stand prior to you?

A. That's right.

Q. What time did you take over at the Charlotte yard, what time of the month and day?

A. May 16.

Q. Of what year?

A. 1957.

Q. What was your position?

A. Terminal Trainmaster.

Q. Of the Charlotte Yard?

A. Yes, sir.

Q. Was Mr. Roy Walker working at that terminal as a yard fireman at that time?

A. He was carried on the seniority list.

Q. He was on the seniority list at that time?

A. Yes, sir.

Q. When you were Terminal Trainmaster at the Charlotte Yard, did Mr. Roy Walker come to see you in response to a letter that he received from Mr. J. R. Brosnan with reference to the protection of his seniority and, if so, when?

A. On May 29, approximately 2:00 to 2:30 P.M. of that evening.

Q. May 29 at when?

A. Approximately 2:00 to 2:30 P.M.

Q. Who was with him?

A. Best I recall, his daughter.

Q. Did you have a conversation with Mr. Walker on that day at that time?

A. Yes, sir.

Q. Will you give the Court the substance of that conversation as near as you remember it?

A. Mr. Walker arrived approximately 2:00 to 2:30 P.M. on May 29 and asked for Mr. Edgar Brinkley, Terminal Trainmaster, and I informed Mr. Walker that Mr. Brinkley had retired and I was filling the Terminal Trainmaster's

position and he said that he came to mark up in lieu of the letter which he had received and he noticed a note on the crew book restricting him from marking up as of midnight May 28.

Q. And what did you tell him in response to that?

A. He told me that he had been sick or that he had been in the hospital.

Q. From the time you came to this job on the Charlotte Yard until the day Mr. Walker came to see you, did you receive any letters or telephone calls with reference to this [fol. 53] matter from Mr. Walker or anyone for him?

A. Absolutely none.

Q. Is there anything in your file that you took over to indicate such a call was made?

A. Absolutely nothing.

Q. In your job as Terminal Trainmaster do you have charge of the crew books?

A. Yes, sir.

Q. The crew sheets, so to speak?

A. That's right.

Q. What are the crew sheets, for our information?

A. The crew sheet is a register, so to speak, giving the names of the employees working on a given date.

Q. If such a telephone call had been made, where would it have been noted?

A. On the crew sheets.

Q. Now, do you in the exercise of your job, or did you in the exercise of your job as Terminal Trainmaster of Charlotte, have charge of those books or have supervision over those crew sheets?

A. Yes, sir.

Q. How often did you check those crew sheets?

A. Many times during the day, 24-hour period.

Q. Did you check them every day?

A. Yes, sir.

Q. Did you check them more than once a day?

A. Yes, sir.

Q. Now, did any of these crew sheets in your checking show any telephone call?

Mr. Hamrick: Objection. The crew sheets would be the best evidence.

Q. Well, did you check them to see?

Court: Overruled. Go ahead.

Q. You said you checked them every day, did you check them on this day?

A. Yes, sir.

Q. Did you find any notations of any telephone calls being made with reference to him being sick?

A. No, sir.

Q. By him or anyone for him?

A. No, sir.

Q. Mr. Curlee, when he was in your office talking about this letter he got, talking about being sick, what did he say to you?

A. He said he had been sick in the hospital and he was of the opinion that his thirty days was up at the night of the 29th of May.

[fol. 54] Q. Did he make any further statement with reference to that part of it?

A. No, sir. I questioned him and asked him if he could have not called in or wrote a letter or had someone to have notified us in that period of thirty days that he had been sick.

Q. What did he say to that?

A. He said he never thought of it. He thought his thirty days was up on May 29th midnight.

Q. He said he never thought of that?

A. Yes, sir.

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J. M. Ford, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hardy:

Q. Will you state your full name, please sir?

A. J. M. Ford.

Q. By whom are you employed, Mr. Ford?

A. Southern Railway Company.

Q. How long have you been employed by the Southern Railway Company, Mr. Ford?

A. Since 1923.

Q. What is your present position with the Southern Railway Company, Mr. Ford?

A. I am Assistant Director of Labor Relations.

Q. Where is your office located?

A. Washington, D. C.

Q. As an Assistant Director of Labor Relations, Mr. Ford, what are your duties? . . . insofar as firemen are concerned.

A. I handle all claims and grievances that arise under the Collective Bargaining Agreement between the company and the locomotive firemen. By the term dealing with them means I handle correspondence in connection with claims and/or grievances which reach my office on appeal from the lower level.

. . . . . .

[fol. 55] Q. Mr. Ford, I hand you a printed booklet which has been previously identified as the collective bargaining agreement, in all material respects the agreement in effect between Southern Railway Company and the class of employees known as Firemen, Hostlers and Outside Hostler Helpers employed by Southern Railway, said agreement being signed by the Brotherhood of Locomotive Firemen and Enginemen on behalf of those employees. I'll ask you is

that the contract which, in all material respects, is the contract under which Mr. Walker was employed?

A. It is.

Q. Are you familiar . . . .

Court: Before you leave that, how long does that contract last?

Mr. Hardy: These contracts have no terminal date. They are, from time to time, amended, but unlike the contracts in some other industries they are not for fixed periods of time. They are until such time as they are terminated or amended in accordance with the provisions of the Railroad Labor Act.

Court: I think I must have misunderstood either you or Mr. Ward to contend that in no event could the plaintiff recover for the period longer than the contract. That contention was made in chambers. You withdraw it. The contract goes on, apparently.

Mr. Hardy: I'm sorry, I don't recall. That may or may not have been while I was in there, sir. The contract goes on until it is terminated in accordance with the Railroad Labor.

Court: All right. Thank you, sir.

Mr. Ford, I believe you just said you are thoroughly familiar with that contract?

A. I did not. You didn't ask me.

Q. I will ask you, then. Are you thoroughly familiar with that contract?

A. I am.

Q. Do you have occasion in your work to apply and interpret that contract?

A. I do.

[fol. 56] Q. Frequently or occasionally?

A. Daily.

Q. Mr. Ford, I invite your attention to Article 25, Paragraph (e), Paragraph (3), on Page 38 of that contract. Are you familiar with that provision?

A. I am.

Q. Mr. Ford, does that provision provide for a thirty-day period?

A. It does.

Q. Mr. Ford, you were in this courtroom throughout the hearing today, were you not?

A. Yes, sir.

Q. Do you recall a letter written by Supt. Brosnan on April 29, 1957, to Mr. Walker was introduced in evidence?

A. I do.

Q. Have you ever seen a copy of that letter?

A. Yes, sir.

Q. Is that letter the type of letter and in substantially the language customarily used on Southern Railway Company lines when notice is sent to a fireman informing him that his services are needed and that he should report within thirty days?

A. It is typical.

Q. Mr. Ford, when such a letter is written, how is the thirty-day period specified in that letter calculated?

Mr. Hamrick: Objection.

Court: For firemen?

Mr. Hardy: For firemen. We are speaking of a letter written under this section of the firemen's agreement.

Court: Overruled.

A. Would you repeat the question, please?

Q. Would you read the question, please.

(The Court Reporter reads the question on Line 9 above.)

Court: This is, of course, for firemen, not for some other kind of trainmen.

Mr. Hardy: That is correct, sir.

A. Calculated from the day the letter is written, meaning that the first day is the date of the letter.

Q. Is this the uniform and accepted practice in sending letters of this type, Mr. Ford, on Southern Railway Company lines?

A. It is.

[fol. 57] Q. Has it ever, to your knowledge, been questioned by the Brotherhood of Locomotive Firemen and Enginemen who represent firemen on Southern Railway lines?

Mr. Hamrick: Objection.

Court: Overruled.

A. Not to my knowledge.

Court: Have you ever had the question come up before this case where it is of critical importance?

A. Not in my time.

Q. Mr. Ford, I invite your attention to Article 32 of this same contract, Paragraph (b), headed "Grievances". I will ask you if that is the contract procedure to be followed by an employee or his representative or attorney in progressing claims or grievances which he may have arising under that contract?

Mr. Hamrick: Your Honor, the contract is in evidence and I have stipulated I am not going on any administrative remedies. I don't mean to belabor the point.

Court: Counsel agree it is Article 32. Let's go on to something else.

* * * * * * *

W. P. Barton, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Edwards:

Q. State your name, please.

A. W. P. Barton.

Q. Mr. Barton, are you now working with the Southern Railway?

A. No, sir, I have been retired for two years.

Q. Have you in the past worked for the Southern Railway?

A. Yes, sir, I have.

Q. Were you working with the Southern Railway on April 29, 1957?

A. Yes, sir.

Q. In what capacity.

A. Division Chief Clerk at Greenville.

[fol. 58] Q. In what office?

A. Superintendent's office.

Q. The Superintendent Mr. Brosnan?

A. That's right.

Q. Now, you were in court when the letter was introduced, were you not, the letter of April 29, 1957, addressed to Mr. Walker from Mr. Brosnan to come in and protect his seniority?

A. Oh, yes.

Q. Have you ever seen that letter or did you see that letter before it was mailed?

A. I dictated it for the Superintendent's approval and signature.

Q. You dictated the letter yourself?

A. That's right.

Q. After you dictated the letter and it was prepared, did Mr. Brosnan read it and sign it?

A. Yes, sir.

Q. Did you mail it yourself?

A. No, sir, I do not personally take letters to the Post Office.

Q. When do you send your mail out?

A. That was a certified special delivery letter, as I recall, and it was mailed the day it was written.

Q. Did you send it registered mail?

A. Yes, sir.

Q. Did you get a return receipt?

A. Yes, sir. Oh, yes, yes we did.

Q. Stating the letter had been received?

A. Yes.

Q. Did you have, during that thirty-day period, any communication from Mr. Walker?

A. I did not.

Q. You know nothing further about it?

A. That's right.

Q. The thirty-day period in the letter is what I meant.

A. Yes, I understand.

* * * * * * *

Redirect examination.

By Mr. Edwards:

Q. Mr. Barton, after this period, in other words about the 30th day of May, which is one day after he says he was in Charlotte, did you see Mr. Walker in Mr. Brosnan's office?

A. Yes, sir.

Q. You did?

A. Yes, sir.

[fol. 59] Q. Did Mr. Walker have a conversation with Mr. Brosnan?

A. He did.

Q. What did he say in that conversation?

A. He said that he had come down to tell Mr. Brosnan that he had no ill feeling against the company, he had no complaint with the decision and that he was going back home and stay there.

Q. Did he make any mention about being sick?

A. No, sir.

Q. He didn't say anything about that. Who was with him when he came to Mr. Brosnan's office?

A. He was alone.

Q. You were there and who else?

A. Mr. Brosnan.

Q. Was anyone else present?

A. No one else.

Q. Did he make any other statements about anything in connection with this notice? Did he make any other statements in your presence?

A. I don't recall anything else.

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COLLOQUY BETWEEN COURT AND COUNSEL

Court: Now may I ask you some questions. You perhaps better take my questions down, Mrs. Berger. Referring to Defendant's Exhibit #1 written on April 29, 1957, how do you interpret the contract with respect to when this letter was written and here's what I mean. Could it have been written by the Superintendent, well, say a month earlier if he had wanted Walker to come back to work a month earlier? Is there a cutoff period involved that dictated the date of the letter, April 29?

Mr. Hardy: Let me see if I understand Your Honor. On April 29, 1957, I take it, that Supt. Brosnan needed Mr. Walker's services and therefore sent him this letter. Now, I don't know because I don't believe it's in evidence. I honestly don't know whether Mr. Brosnan needed Mr. Walker's services before that date, a month before that date or not. If he had needed him a month before that date I suppose he would have written him the letter, I don't know, sir.

[fol. 60] Court: How do you interpret the contract with respect to assuming that on April 9—I'm not deciding this, just assuming on April 9 Walker did talk to Brinkley as the evidence tends to show for the plaintiff. Does that do something under the contract? Does it start a period running of thirty or sixty days before he can be required to come back?

Let me withdraw that one because that's hard. That's related to this case. Let me make it hypothetical. What would have been the effect if on May 11, for example, just suppose Walker had written to the right man, whether it's Brosnan or who, he had written the right man and just

told him the truth, I'm sick, I'm in the hospital, dated May 11, what is the effect of that under the contract?

Mr. Hardy: As I understood Mr. Brosnan's testimony, if a letter had been received from Mr. Walker by the right man saying he was sick and unable to report and would be unable to report within the period allowed him, I understood Mr. Brosnan to say that he would have taken care of it.

Court: Do you agree with Mr. Brosnan's interpretation of it as counsel for the railroad?

Mr. Hardy: Yes, sir.

Court: Is there anything in this long contract between the railroad and the union that specifies the effect of illness on a period such as this, does it spell it out?

Mr. Hardy: Is there anything in the contract which specifies a period of illness?

Court: Yes.

Mr. Hardy: I know of nothing. If Your Honor please, these contracts are made against a background of practice. That is one of the reasons that we, as well as other hearings, find them so strange in form and content.

Court: I agree. That's why we've got a Railroad Adjustment Board, for one reason.

Mr. Hardy: That's right, sir.

[fol. 61] Court: There is some evidence tending to show that on March 7 at 9:00 P.M. that Mr. Walker's daughter telephoned. I'm not trying to decide now whether this is true or false but assuming that it is true, does that have a legal effect on the letter of April 29?

Mr. Hardy: The March 7 call, as I see it, sir, does not have any effect on the period April 29 and thirty days after.

Court: I think you mean that nothing that happened before the letter of April 29, is your contention, would have any effect on that letter.

Mr. Hardy: I would be happy to explain why. Early in March, the 10th or 11th . . .

Court: March 7th was the telephone message.

Mr. Hardy: Well, now, from March 7 through virtually the end of April is something like seven weeks. Assuming the lady called up, of which we have no record, and if you just call in and say, My father is sick, he can't come to work and you don't say for how long, I think nothing strange that seven weeks later a superintendent, having no further information—as a matter of fact he didn't have this, but suppose he did—would not have any reason to assume he was still sick or assume he wasn't.

Court: Applying this same expertise of the N.L.R.B. or the Railroad Adjustment Board, which you need in this area and perhaps we lack, about the letter of May 11, if there was one, if that letter of Dr. Harris was mailed to Mr. Brinkley about May 11, as I understand it it's more a matter of common sense than a special provision of the contract. You can see, and Brosnan said—I've been over this with you—that sort of kills this letter of April 29. He's got to write another one, wait a reasonable period and write another one.

Mr. Hardy: It's a matter of common sense, yes, sir.

Court: Thank you, sir.

(Mr. Hamrick is heard in argument.)

[fol. 62] Court: Do you still insist North Carolina law applies?

Mr. Hardy: This contract was being performed in North Carolina. What page was that on?

Mr. Hamrick: On Page 128.

Mr. Hardy: There are various memoranda of understanding subsequent to this contract and the last page I don't think is the page that . . .

Court: Is it fair to say that if Walker has any rights he's got them under this union contract. He's got no common law contract.

Mr. Hardy: No, sir.

Court: I think he agrees to that.

Mr. Hamrick: Yes, sir. It also says on Page 102, Washington, D. C., February 26, 1941.

[fol. 63]

DEFENDANT'S EXHIBIT No. 3

Mr. Roy Edmund Walker,
Route 1,
Box 102,
Forest City, N.C.

Dear Sir:

Please refer to my letter dated April 29, 1957 advising you to protect your seniority within 30 days.

You did not report and protect your seniority as instructed and this is to advise you under the provisions of the Firemen's Agreement, Article 25 (e) 3, that your name has been stricken from the Firemen's Seniority list and you are no longer considered an employee of the Southern Railway Company.

Please turn in all company property you have in your possession to Terminal Trainmaster Curlee.

Yours very truly,

Superintendent

Blind:
Mr. Curlee:
Mr. Webb:
Mr. Wheeler:

[fol. 64]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9967

ROY WALKER, Appellee,

versus

SOUTHERN RAILWAY COMPANY, Appellant.

No. 9968

ROY WALKER, Appellant,

versus

SOUTHERN RAILWAY COMPANY, Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. J. B. Craven, Jr., Chief District Judge.

OPINION—December 22, 1965

[fol. 65] Argued November 3, 1965.

Before Haynsworth, Chief Judge, Bryan, Circuit Judge, and Michie, District Judge.

Jerome Ackerman (W. Graham Claytor, Jr., James I. Hardy and Harold K. Bennett, and Covington & Burling on brief) for Appellant in No. 9967 and Appellee in No. 9968, and J. Nat Hamrick for Appellee in No. 9967 and Appellant in No. 9968.

ALBERT V. BRYAN, Circuit Judge:

Roy Walker, a fireman on the Southern Railway Company, may recover damages of $4500 from the railroad, the District Court has held, for terminating his seniority, as a result of which he was not allowed to work. The assessment was based on the finding that it was a discharge in violation of the collective bargaining agreement between the railroad and his union. Both Walker and Southern appeal.

The facts are simple. Reporting for work on March 3, 1957 Walker found he had been displaced in his job by a fireman with superior seniority. Whereupon he told the [fol. 66] crew clerk he was sick and was going home. According to his testimony he kept the officials apprised of his continued illness and inability to work. On April 29, 1957 the railroad wrote him that "you stand for work on your seniority and unless you protect your seniority within 30 days from the date of this letter, you will have forfeited your seniority". Authority for the 30-day stipulation was the collective bargaining agreement. As of May 28, 1957 at midnight the Southern cancelled his seniority, holding ineffective—as a day beyond the 30 days—his appearance on May 29 to preserve his seniority. However, the Court upheld Walker's contention that a correct counting of the 30 days gave him until May 29 to prevent the forfeiture.

The railroad now contends that the District Court was without jurisdiction because the complainant had not first exhausted the grievance procedures provided in the collective bargaining agreement and the privilege of a review by the National Railroad Adjustment Board under the Railway Labor Act, 45 USC 151, 153(i). The employee assigns as error mitigation by the Court of his damages, saying there was no evidence disclosing other earning opportunities open to him after leaving the Southern.

We must sustain the railroad's appeal. At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad

for a breach of the collective agreement when, as here, the employee asked money damages only and not reinstatement. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 US 653 (1953); *Slocum* v. *Delaware & W. RR*, 339 US 239 (1950); *Moore* v. *Illinois Central RR*, 312 US 630 (1941). But closely following the entry of judgment in this action, the Supreme Court decided *Republic Steel Corp.* v. *Maddox*, [fol. 67] 379 US 650 (1965). Although that case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the collective bargaining agreement and before the Adjustment Board prior to suit. Cf. *Neal* v. *System Board of Adjustment*, 349 F2d 722, 727 (8 Cir. 1965).

Specifically, *Maddox* denied judicial recourse to the discharged employee until he had "attempt[ed] use of the *contract* grievance procedure agreed upon by employer and union as the mode of redress." (Accent added.) True, the opinion observed that the Court did not mean to overrule *Moore* v. *Illinois Central RR*, supra, 312 US 630, "within the field of the Railway Labor Act", 379 US at 657, fn. 14; but the ratio decidendi embraces the instant controversy.

The next question, presently, is whether the influence of *Maddox* also compels railroad employee to take advantage of a review by the Railroad Adjustment Board. There the question was, of course, not expressly before the Court, but it is before us if Walker is to be saved from further court litigation. On the basis of the *Maddox* decision we hold that, if the employee does not prevail on the contract remedies, then before instituting a lawsuit he must petition review by the National Railroad Adjustment Board. 45 USC 153(i). See *Beebe* v. *Union RR*, 208 A2d 16 (Pa. Super. Ct. 1965).

The Board was obviously created to answer just the type of complaint now before us. The admonishment of the Railway Labor Act, supra, 45 USC 152 that "[I]t shall be the duty of all carriers . . . and employees to exert every reason-

able effort . . . to settle all disputes, . . . arising out of the [fol. 68] application of . . . agreements" warrants the demand that such differences be first submitted to the very agency erected to resolve them. Cf. *Brotherhood of RR Trainmen* v. *Chicago R. & I. RR*, 353 US 30, 34-39 (1956); *Gunther* v. *San Diego & A.E. Ry.*, 34 U.S.L. Week 4058 (U.S. Dec. 8, 1965).

The imposition of this condition was, seemingly, foreshadowed by *Pennsylvania RR* v. *Day*, 360 US 548 (1959), where the Court held that the Railroad Adjustment Board had exclusive primary jurisdiction over a retired railroad employee's complaint arising under a collective bargaining agreement. This is the trend of relevant Federal decisional law: that disputes rooted in a collective bargaining agreement should be brought to the Board for resolution before resort to the courts. National uniformity in decision and expertness in understanding the problems are among the advantages urging the preference. *Union Pacific RR* v. *Price*, 360 US 601 (1959); see also *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F2d 342, 343 (3 Cir. 1960).

The need and place of the Board are pointedly exampled now. The rightfulness of Walter's discharge depends upon the method of calculating the time stipulated by the collective agreement within which he had to "return to active service" to avoid forfeiture of seniority. According to his computation his return was punctual, under the railroad's reckoning he was too late. Thus not only is there a need for uniformity in interpretation here, but the determination of the controversy calls for railroad-labor knowledgeability, something possessed in the highest degree by the Adjustment Board. See *Gunther* v. *San Diego & A.E. Ry., supra*, 34 U.S.L. Week 4058 (Dec. 8, 1965).

[fol. 69] Letters in the record reveal that the railroad asked the attitude of the union upon the railroad's action in respect to Walker. In response the union expressed approval and suggested that "the matter rest as it is". From

this, counsel for Walker argues that remand of his claim to the contract grievance processes would be unfair, since it has thus already been rejected by both the railroad and the union, who are responsible for and supervise the prosecution of these remedies. Notwithstanding, we cannot anticipate that the union will not fulfill any obligation it may have under the duty of fair representation owed to Walker under the collective bargaining agreement. At all events, Walker should give the union an "opportunity to act on his behalf." *Republic Steel Corp.* v. *Maddox,* supra, 379 US at 653.

"If the union refuses to press or only perfunctorily presses the individual's claim," he has his remedies as the Court intimates in *Maddox,* 379 US at 652. Among others, he may himself follow through on the intramural steps and the Adjustment Board review just discussed. 45 USC 153(i); but cf. *Wade* v. *Southern Pacific Co.,* 243 FSupp. 307 (S.D. Texas 1965). If the time limitations of the internal remedies are interposed to preclude a hearing, the fairness of their application could also be tested before the Board.

Consequently, the judgment on appeal should be vacated and the action returned to the District Court for dismissal. Each party will bear his and its costs here.

Vacated and remanded for dismissal.

[fol. 70]

IN THE UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

No. 9967

ROY WALKER, Appellee,

vs.

SOUTHERN RAILWAY COMPANY, Appellant.

JUDGMENT—December 22, 1965

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Asheville, for further proceedings consistent with the opinion of the Court filed herein; and that each party bear its own costs on appeal.

December 17th, 1965.

Albert V. Bryan, United States Circuit Judge.

[fol. 71]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9968

ROY WALKER, Appellant,

vs.

SOUTHERN RAILWAY COMPANY, Appellee.

JUDGMENT—December 22, 1965

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Asheville, for further proceedings consistent with the opinion of the Court filed herein; and that each party bear its own costs on appeal.

December 17th, 1965.

Albert V. Bryan, United States Circuit Judge.

[fol. 72] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 73]

SUPREME COURT OF THE UNITED STATES

No. 1129—October Term, 1965

ROY WALKER, Petitioner,

v.

SOUTHERN RAILWAY COMPANY.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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